BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BRIAN S. SACHS	)	
Claimant	)	
V.	)	Docket Nos. 1,053,921,
	)	1,053,922 & 1,053,925
CITY OF TOPEKA	)	
Self-Insured Respondent	)	

ORDER

Respondent requested review of Administrative Law Judge Rebecca Sanders' June 18, 2013 Award, but only as it relates to Docket No. 1,053,925. The Board heard oral argument on October 15, 2013. George Pearson, of Topeka, Kansas, appeared for claimant. Matthew Crowley, of Topeka, Kansas, appeared for respondent.

The Award, utilizing a November 16, 2010 date of accident, indicated claimant sustained a 10% whole body impairment and a 56% permanent partial general (work) disability based on a 12% task loss and a 100% wage loss, both stemming from Docket No. 1,053,925, in addition to a 5% preexisting impairment.

The Board has considered the record and adopted the Award's stipulations. Only Docket No. 1,053,925 was appealed. The other cases are not considered in this appeal.

ISSUES

Docket No. 1,053,925 concerns a November 16, 2010 motor vehicle accident, as well as a series of injurious accidents thereafter, both involving claimant's cervical spine. At a November 20, 2012 prehearing settlement conference, the parties stipulated to using a November 16, 2010 date of accident in Docket No. 1,053,925.

Respondent's application for review asks the Board to decide if claimant proved entitlement to permanent partial disability compensation for a November 16, 2010 date of accident, primarily focusing on whether claimant's motor vehicle accident caused permanent impairment. Respondent asks the Board to determine claimant's preexisting impairment and argues claimant proved no new impairment. Respondent also argues prescription reimbursement should not have been ordered in Docket No. 1,053,925.

Respondent asserted in its brief that claimant's date of injury by repetitive trauma was September 7, 2011, based on claimant's written demand for neck treatment, or December 14, 2011, his last day worked. Respondent argues amendments to the Kansas Workers Compensation Act that went into effect on May 15, 2011 control this case. At oral argument, the parties agreed such arguments were never presented to Judge Sanders.

Claimant asserts his preexisting cervical spine condition was permanently worsened by both his motor vehicle accident and his work thereafter. He wants the Award affirmed.

Issues for the Board's review are:

1) Are the parties bound by their stipulation that the date of accident was November 16, 2010, or may respondent, for the first time on appeal, raise the issue of date of accident or date of injury by repetitive trauma?

2) What is the nature and extent of claimant's disability?

3) Should respondent pay outstanding prescription bills under Docket No. 1,053,925?

FINDINGS OF FACT

Claimant is 43 years old with a GED. He was employed with respondent as a utility systems worker for approximately six years. His job duties involved testing water hydrants and shoveling dirt after water main breaks. In order to turn on water hydrants to test the flow, claimant used a long wrench that he cranked in a circular motion. This activity was continuous for about 10-15 minutes and done 15-20 times a day. Shoveling dirt was done for about fifteen minutes, four to six times a day.

On November 16, 2010, while performing his job duties, claimant was involved in a motor vehicle accident. Claimant testified the only injury he sustained in that accident was to his neck. He was referred by respondent to Donald Mead, M.D., who is board certified in occupational medicine.

Claimant was sent by respondent to Dr. Mead on November 18, 2010. Claimant had back discomfort and moderate neck pain with no radiculopathy. Claimant's pain level was a 5 on a 1-10 pain scale. Claimant advised Dr. Mead that he had chronic neck pain for the last 10 years and was seeing a chiropractor on an as needed basis. An x-ray taken of the cervical spine was normal, other than some very minor spurring. Dr. Mead diagnosed claimant with a cervical strain and prescribed an anti-inflammatory and a muscle relaxer. Claimant was released to regular duty with no restrictions. Dr. Mead noted "[r]eturn within 3 days if symptoms persist, sooner if symptoms worsen."[1]

Claimant's prior attorney's application for hearing was received by the Division of Workers Compensation on December 23, 2010. Claimant alleged a date of accident of "on or about 11-16-10 and series afterward" due to "car accident and series afterwards" and which injured his back, neck and affected extremities.[2] On December 29, 2010, the Division emailed a "Notice of Hearing/Application for Hearing" to the Topeka City Attorney Office. Such notice listed a date of accident as "Series 11/16/10."

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[1] Mead Depo., Ex. 4 at 5.

[2] Application for Hearing (received Dec. 23, 2010).

On January 7, 2011, claimant returned to Dr. Mead for a recheck of his neck. Nurses notes indicated claimant complained of neck and shoulder pain which he estimated at a 7 or 8 on a 1-10 pain scale. There was also a reference indicating claimant "states has a lawyer & told to tell that has pain from repetitive motion."[3] Dr. Mead noted claimant reported some temporary worsening in his neck, which had rebounded back to where it was before the accident. Based upon this comment, Dr. Mead believed claimant's neck symptoms had resolved and he released him with no cervical spine restrictions.

On January 14, 2011, claimant was seen at his prior attorney's request by Edward J. Prostic, M.D., a board certified orthopedic surgeon. Dr. Prostic's physical examination showed alignment was satisfactory, no tenderness, full cervical range of motion except for extension, which was restricted to 45°, no nerve root irritability, no muscle spasms, non-neurological deficits, no cervical myelopathy and no thoracic outlet syndrome. Dr. Prostic diagnosed claimant with a cervical sprain and strain. No treatment was recommended.

From January 7, 2011 to May 12, 2011, claimant was off work for injuries concerning the other docketed cases, including his upper extremities and shoulders.[4] Claimant did not receive treatment for his neck during this time, but had a February 7, 2011 EMG. The EMG report stated, among other complaints, that claimant had neck pain. Such EMG was interpreted as showing no clear findings for cervical radiculopathy.

Claimant testified his neck did not bother him as much when he was off work. However, on May 13, 2011, claimant returned to work without restrictions and soon began missing work due to neck pain. Claimant testified he would write on leave forms that his need for leave was related to his severe neck pain. He thought such notation on the leave forms would result in him being referred for treatment. When claimant was disciplined about his absences, he informed respondent that his absences were due to neck pain and that he wanted treatment for his neck. Respondent acknowledged claimant wrote on the forms that he was off due to neck pain, but denied he ever requested medical treatment.

Claimant returned to Dr. Prostic at his current attorney's request on August 10, 2011, complaining of intermittent pain at the back of his neck with increased difficulty looking upward. Dr. Prostic noted claimant did not have evidence of cervical radiculopathy which had been previously indicated by an EMG.[5] Dr. Prostic recommended anti-inflammatory and analgesic medicines, as well as stretching and strengthening exercises, for claimant's neck and shoulders.

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[3] Mead Depo., Ex. 5 at 2.

[4] Of note, claimant also alleged repetitive injury to his neck over time in Docket No. 1,053,922.

[5] Claimant underwent two EMGs – one on October 22, 2010 which showed mild, active right C8 radiculopathy and one on February 7, 2011 which showed no clear findings for cervical radiculopathy. (Stipulation (filed Apr. 25, 2013), Ex. A and B.)

Dr. Prostic assigned an 8% impairment to the body as a whole for claimant's cervical spine, pursuant to the AMA *Guides*[6] (hereafter *Guides*). Dr. Prostic discounted claimant's impairment from a 15% rating under DRE Category III based on good range of motion, no positive nerve root signs and no obvious neurological deficit.

On September 7, 2011, claimant's attorney sent a letter to respondent's attorney demanding medical treatment for claimant's back, neck and carpal tunnel.

Claimant's employment was terminated on December 14, 2011 due to excessive unauthorized absences. Claimant estimated he requested medical treatment for his neck approximately ten times between his return to work and until his termination.

Claimant was eventually sent to Michael Smith, M.D., an orthopedic surgeon, in February 2012. Dr. Smith ordered a cervical spine MRI, injections (which were administered by Dr. Giroux) and physical therapy. This treatment was provided as a result of claimant's attorney's September 7, 2011 demand. While surgery was discussed, claimant declined because he wanted to see how the injections worked. Claimant testified the injections provided fleeting relief. He was released by Dr. Smith on April 24, 2012.

Claimant returned to Dr. Prostic at his attorney's request on September 4, 2012 complaining of a continued neck ache with difficulty sleeping. Dr. Prostic noted that claimant had undergone facet injections and medial branch blocks. Physical examination revealed range of motion of 50° of flexion and extension each, 50° of right rotation, 60° of left rotation, and 40° lateral bend to each side. An x-ray of the cervical spine showed straightening of the lordotic curve with degenerative changes. It was Dr. Prostic's opinion that "repetitious forceful activities with his upper extremities"[7] caused claimant's neck injury. While Dr. Prostic indicated claimant did not have evidence of cervical radiculopathy, it was his belief that claimant would require more treatment in the future. Dr. Prostic rated the claimant with a 10% impairment to the body as a whole pursuant to the *Guides*. Dr. Prostic testified he increased the impairment rating because claimant had facet injections and medial branch blocks. Dr. Prostic felt if claimant was willing to subject himself to that kind of treatment, his symptoms must have been more severe than he previously thought.

As a result of the work injury, Dr. Prostic provided restrictions of medium-level employment. Dr. Prostic reviewed a task list prepared by Dick Santner[8] and testified claimant was unable to perform 14 of the 58 non-duplicative tasks for a 24% task loss, all attributable to claimant's neck and shoulders.

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[6] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[7] Prostic Depo. at 43.

[8] Claimant was interviewed by Mr. Santer, a vocational rehabilitation counselor, on May 22, 2012.

At a November 20, 2012 prehearing settlement conference, the parties stipulated that the date of accident in Docket No. 1,053,925 was November 16, 2010.

On January 30, 2013, claimant was seen at respondent's request by Chris Fevurly, M.D., who is board certified in internal medicine and preventive medicine, as well as certified as an independent medical examiner. Claimant complained of constant neck pain which was more severe than what he experienced in 2001. Physical examination revealed well preserved range of motion and no radicular component. Dr. Fevurly acknowledged the October 22, 2010 EMG showed some radiculopathy, but believed the finding was a residual of a 2001 accident. Dr. Fevurly reached this conclusion because claimant showed no current nerve root or dermatomal deficits, motor deficits or deep tendon reflex deficits, and there was no tenderness in the cervical spine or the paraspinal musculature. Dr. Fevurly diagnosed claimant with a minor sprain/strain without significant injury.

Dr. Fevurly found insufficient clinical evidence that claimant had an impairment to the body as a whole based on DRE Category III. Dr. Fevurly referenced Dr. Delgado's report in which Dr. Delgado found claimant had a 5% impairment to the cervical spine, pursuant to the *Guides*, due to the 2001 accident. Dr. Fevurly noted claimant's complaints to him were similar to the ones listed in Dr. Delgado's report. As a result, Dr. Fevurly concluded there was no new impairment to claimant's cervical spine. Dr. Fevurly provided no restrictions and felt claimant would not benefit from additional treatment.

Claimant has not worked anywhere subsequent to his employment being terminated by respondent. Claimant testified that other than a cervical injury in 2001 while employed by U.S.D. 501, which he settled in 2003, he did not have prior neck problems. Between 2003 and 2010, claimant received chiropractic treatment once or twice a month to keep his symptoms under control. Claimant testified that since November 16, 2010, he has had a significant increase in neck pain. He described the pain as a burning sensation and more severe than a tension headache. The pain is located at the back of his skull and neck. While the severity of the pain varies, the more severe pain occurs three times a week.

Concerning claimant's neck, the Award states:

> The issue as to whether Claimant's cervical spine complaints arose out of and in the course of his employment with Respondent is less easy to determine. Part of that is due to Claimant being a poor historian. Secondly, Claimant alleges that his job duties caused his cervical spine complaints. Shortly after Claimant had an EMG ordered by his personal physician that showed mild C8 radiculopathy, Claimant had a work related motor vehicle accident. Claimant was sent by Respondent to see Dr. Mead two days after the motor vehicle accident for cervical spine complaints. Claimant was diagnosed with cervical sprain/strain and eventually released with no restrictions due to his cervical sprain/strain. Even after being off work for four months, Claimant still had cervical spine complaints. The pain in Claimant's cervical spine was not corrected by his left shoulder surgery. The symptoms in his cervical spine were relieved with injection therapy.

> Another factor to consider in the cervical spine complaints is that Claimant had a prior cervical spine injury due to a work injury and that case was settled for five percent impairment to the body as a whole.
>
> In looking at the evidence as a whole, it is found and concluded that Claimant has had an aggravation to his cervical spine condition as a result of his work duties with Respondent and the work related motor vehicle accident. The best indicator of the nature and extent of the cervical spine condition is ten percent to the body as a whole but five percent of that rating is preexisting. Thus Claimant has a five percent impairment to the body as a whole attributable to his work with Respondent.[9]

PRINCIPLES OF LAW

In workers compensation litigation, it is claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[10]

Claimant has the burden of proving his or her right to compensation.[11] The workers compensation laws in effect at the time of an accident govern the parties' rights.[12]

The date of accident due to a series of events, repetitive use, cumulative traumas or microtraumas is a legal fiction[13] and is determined by statute.[14]

K.S.A. 2010 Supp. 44-501(c) states:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

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[9] ALJ Award at 18.

[10] K.S.A. 2010 Supp. 44-501 and K.S.A. 2010 Supp. 44-508(g).

[11] K.S.A. 2010 Supp. 44-501(a) and K.S.A. 2010 Supp. 44-508(g).

[12] K.S.A. 44-505(c) (Furse 2000).

[13] *Saylor v. Westar Energy, Inc.*, 292 Kan. 610, 615, 256 P.3d 828 (2011) ("[D]esignation of an accident date in a repetitive use case is not a factual determination of the precise moment at which the claimant suffered the personal injury. . . . [A]ssignment of any single date as the "accident date" for a repetitive use/cumulative traumas injury is inherently artificial and represents a legal question, rather than a factual determination."); see also *Curry v. Durham D & M, LLC*, No. 1,051,135, 2011 WL 1747854 (Kan. WCAB Apr. 27, 2011).

[14] K.S.A. 2010 Supp. 44-508(d) and K.S.A. 2011 Supp. 44-508(e).

K.S.A. 44-510e(a) states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. . . . Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

ANALYSIS

1) THE PARTIES STIPULATED TO A NOVEMBER 16, 2010 DATE OF ACCIDENT; RESPONDENT MAY NOT, FOR THE FIRST TIME ON APPEAL, ALLEGE A DIFFERENT DATE OF ACCIDENT.

Respondent alleges in its brief that claimant's date of injury by repetitive trauma is September 7, 2011, when claimant's attorney sent a demand letter for neck treatment, or December 14, 2011, claimant's last day worked. Based on such arguments, respondent argues that this case is controlled by the amendments to the Kansas Workers Compensation Act that became effective May 15, 2011. Specifically, respondent asserts claimant cannot have a work disability award if he cannot prove more than a 7.5% whole body impairment or at least 10% whole body impairment where there is preexisting impairment,[15] he cannot prove wage loss if his wage loss is due to termination for cause,[16] he did not put on evidence regarding prevailing factor,[17] and he did not show that his repetitive trauma was based on clinical and diagnostic testing.[18]

Despite respondent's creative and well-intended argument, the parties agreed at oral argument that any issue regarding date of accident or date of injury by repetitive trauma was never presented to Judge Sanders. Further, the file contains no indication that any of the provisions of the new law were ever raised until the appeal was briefed.

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[15] See K.S.A. 2011 Supp. 44-510e(a)(2)(C)(i).

[16] See K.S.A. 2011 Supp. 44-510e(a)(2)(E)(i).

[17] See K.S.A. 2011 Supp. 44-508e and K.S.A. 2011 Supp. 44-508(f)(2)(A)(iii).

[18] See K.S.A. 2011 Supp. 44-510e.

In this case – which was pled as "on or about 11-16-10 and series afterward" – the parties stipulated to a November 16, 2010 date of accident. Such stipulation was made at the prehearing settlement conference and was never withdrawn. Page three of the Award memorializes such stipulation. The parties, based on claimant's testimony and what was alleged in writing, are presumed to be aware that the November 16, 2010 accident involved not just a motor vehicle accident, but repetitive work causing injury as well.[19] The Award, while using a November 16, 2010 date of accident, attributed claimant's neck impairment to both his November 16, 2010 motor vehicle accident and his repetitive work duties. The Board is not limiting the November 16, 2010 date of accident as only involving the motor vehicle accident. Rather, the Board views such date as representing both the motor vehicle accident and date of claimant's repetitive neck injury, which is a legal fiction as noted above.

K.S.A. 44-555c(a) states in part:

> There is hereby established the workers compensation board. The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. **The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge** (emphasis added).

The statute mandates that the Board's consideration be on issues presented to the judge. Issues not raised before the judge cannot be raised for the first time on appeal. To hold otherwise places the Board in the position of trying to decide an issue using an incomplete record and, in this instance, would deny claimant the benefit of evidence that may have been presented if he had been aware that such dispute existed.[20] The Board declines to remand this matter to Judge Sanders.

The parties are held to their stipulation that the date of accident is November 16, 2010. Even if such date was wrong as a matter of law, it amounts to harmless error. Had K.S.A. 2010 Supp. 44-508(d) been used to affix a date of accident, the legal date of accident would have been December 29, 2010, when respondent received written notice of the injury, which included not just the motor vehicle accident, but also an allegation of a series of injuries thereafter. This potential date of accident would not alter the amount of permanent partial disability benefits claimant will receive for his functional impairment. The old law would still apply. Respondent may not assert new law defenses that were never previously raised.

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[19] P.H. Trans. at 61.

[20] See *Scammahorn v. Gibraltar Savings & Loan Assn.*, 197 Kan. 410, 415, 416 P.2d 771 (1966).

2. CLAIMANT'S ACCIDENT RESULTED IN A 10% FUNCTIONAL IMPAIRMENT TO THE BODY AS A WHOLE AND A 56% WORK DISABILITY, LESS A 5% PREEXISTING WHOLE BODY IMPAIRMENT.

The Board affirms the Award's conclusions regarding claimant's 10% impairment of function stemming from both his motor vehicle accident and his repetitive work injuries, as well as his 5% preexisting impairment. Claimant's 56% work disability is affirmed. However, this Award reflects a K.S.A. 44-501(c) credit for preexisting impairment, such that claimant is awarded a 51% work disability (56% work disability minus 5% preexisting impairment = 51% work disability).

3. CLAIMANT'S OUTSTANDING PRESCRIPTION BILLS ARE NOT RELATED TO DOCKET NO. 1,053,925, BUT RESPONDENT AGREED THEY ARE PAYABLE UNDER ONE OR BOTH OF THE DOCKETED CASES THAT WERE NOT APPEALED.

The $59.26 in prescription costs stemmed from the docketed cases not heard on this appeal. Respondent should not have been ordered to pay such expenses in association with Docket No. 1,053,925. The Award is reversed on this issue. However, respondent indicated agreement in its brief to pay such bills in connection with the appropriate claim or claims.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board:

1. does not allow respondent to argue, for the first time on appeal, issues regarding date of accident or potential application of post-May 15, 2011 law to this case;

2. affirms the findings regarding functional impairment, preexisting functional impairment and work disability, but notes that claimant's preexisting impairment must also be deducted from claimant's work disability; and

3. reverses the portion of the Award in which respondent was ordered to reimburse claimant for prescription costs unrelated to this docketed case, but observes that respondent agreed to pay such costs in connection with one or both of the docketed cases that were not appealed.

AWARD

WHEREFORE, the Board modifies the June 18, 2013 Award as noted in the "CONCLUSIONS" paragraph above.

The claimant is entitled to 20.75 weeks of permanent partial disability compensation at the rate of $392.76 per week or $8,149.77 for a 5% functional disability (10% functional impairment minus 5% preexisting impairment), followed by 2.29 weeks of permanent partial disability compensation at the rate of $392.76 per week or $899.42 followed by 188.61 weeks of permanent partial disability compensation at the rate of $416.33 per week or $78,524.00 for a 51% work disability (56% work disability minus 5% preexisting impairment), making a total award of $87,573.19.

As of October 23, 2013 there would be due and owing to the claimant 23.04 weeks of permanent partial disability compensation at the rate of $392.76 per week in the sum of $9,049.19 plus 94.71 weeks of permanent partial disability compensation at the rate of $416.33 per week in the sum of $39,430.61 for a total due and owing of $48,479.80, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $39,093.39 shall be paid at the rate of $416.33 per week for 93.90 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of November, 2013.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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Honorable Rebecca Sanders